Supreme Court, U.S.
FILED
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No. -

IN THE

Supreme Court of the United States

JAMES H. ROANE, JR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a district court's failure to give the unanimity instruction required by *Richardson* v. *United States*, 526 U.S. 813 (1999)—that the jury must unanimously agree on the specific violations that make up the "continuing series of violations" necessary for a continuing criminal enterprise ("CCE") conviction—may be excused as nonprejudicial whenever the jury finds the defendant guilty of three or more predicate crimes.

2. Whether, to convict a defendant of engaging in a continuing criminal enterprise, the jury must unanimously agree on the identities of five or more persons the defendant managed or supervised.

3. Whether petitioner received ineffective assistance where counsel's investigation of his alibi defense to a critical capital charge—that petitioner was at a hotel miles away when the victim was killed—was limited to a cursory search for objective evidence like hotel records where: (1) counsel had "substantial information" that petitioner's alibi was credible (including a disinterested eyewitness who insisted that petitioner was not the killer, petitioner's detailed account of his alibi, which was made more credible by petitioner's candor regarding other charges, and a witness who corroborated petitioner's account); (2) a post-conviction investigator was able to locate the objective evidence supporting petitioner's alibi in just three hours; (3) counsel's search was not restricted by limits on time or resources; and (4) the objective evidence would have significantly bolstered petitioner's misidentification defense on the sole count on which he was sentenced to death.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner James H. Roane, Jr., was defendant-appellant and defendant-appellee in the court of appeals, and a defendant in the district court. Cory Johnson and Richard Tipton were defendants-appellants in the court of appeals, and defendants in the district court. Respondent, the United States of America, was the plaintiff-appellant and plaintiff-appellee in the court of appeals, and the plaintiff in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James H. Roane, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-43a) is reported at 378 F.3d 382 (4th Cir. 2004). The opinions of the district court (Pet. App. 44a-63a and 64a-188a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 9, 2004. Timely petitions for rehearing and rehearing en banc were denied on October 5, 2004 (Pet. App. 189a-190a). On December 16, 2004, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to

and including February 2, 2005, and on January 24, 2005, the Chief Justice again extended the time for filing a petition for a writ of certiorari, this time to and including February 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Sixth Amendment to the United States Constitution and of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*, are set forth in the Appendix at Pet. App. 193a-195a.

STATEMENT

In *Richardson* v. *United States*, 526 U.S. 813 (1999), this Court held that, to convict a defendant of participating in a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848, the jurors must unanimously agree on the identity of the three or more related, predicate crimes that support conviction. This capital case concerns how federal courts should analyze whether a defendant suffered prejudice where the trial court, contrary to *Richardson*, fails to instruct jurors on the unanimity requirement. It also raises a significant and recurring question regarding the investigation that counsel must conduct in a capital case and the degree of deference owed to the district court in resolving ineffective assistance claims.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner James H. Roane, Jr. ("Roane") was convicted of, among other things, conspiracy to possess cocaine base with intent to distribute it in violation of 21 U.S.C. § 846; five counts of committing acts of violence in aid of racketeering activity in violation of 18 U.S.C. § 1959; four counts of using a firearm in relation to a crime of violence or a drug trafficking offense in violation of 18 U.S.C. § 924(c); and one count of possession of cocaine base with intent to distribute it in violation of 21

U.S.C. § 841(a)(1). Roane was also convicted of engaging in a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848, including three potentially capital counts of killing in connection with a CCE in violation of 21 U.S.C. § 848(e). He was sentenced to death for one of the CCE homicides, the murder of Douglas Moody, the only homicide in which he was alleged to be the triggerman. C.A. App. 296; see *id.* at 281-286 (jury recommendations). For the other convictions, he received a sentence of life imprisonment plus 65 years. *Id.* at 296. His convictions and sentences were affirmed in relevant part on direct review. *United States* v. *Tipton*, 90 F.3d 861, 885 (4th Cir. 1996).

Roane sought relief from his conviction and sentence on various grounds under 28 U.S.C. § 2255. Finding that Roane had received ineffective assistance of counsel in connection with the investigation of the Moody homicide, the United States District Court for the Eastern District of Virginia granted Roane's motion for relief from the conviction and death sentence arising from that crime. Pet. App. 44a-63a. However, it denied relief with respect to Roane's other claims, as well as the claims of Roane's co-defendants. *Id.* at 64a-198a. The Fourth Circuit affirmed the district court's decision to deny relief on the other claims, and reversed the district court's grant of relief for the convictions arising from the murder of Douglas Moody. Pet. App. 1a-43a.

1. **Defense counsel's pretrial investigation.** In July of 1992, a grand jury returned a 33-count indictment charging Roane and others with various crimes arising out of drug trafficking operations in and around Richmond, Virginia. The indictment charged that Roane's co-defendants Richard Tipton and Cory Johnson engaged in a "continuing criminal enterprise," 21 U.S.C. § 848, by acting as "partners" in a drug trafficking conspiracy, which began in Trenton, New Jersey, and spread to Richmond, Virginia. Pet. App. 3a. Roane allegedly became involved in the

conspiracy in late 1991. According to the government, the conspiracy involved the distribution of crack cocaine through a network of "workers," and served as the vehicle through which the defendants committed various crimes alleged in the indictment. Most important for present purposes, one of those crimes—the crime for which Roane was ultimately sentenced to death—was the January 1992 murder of Douglas Moody. Moody was shot twice and then stabbed to death as he attempted to flee his assailants. The Moody killing was the only one Roane was alleged to have committed with his own hands.

Before trial, Roane conceded to his counsel that he was involved in many of the crimes with which he was charged. Nonetheless, he consistently denied any involvement in Moody's killing. Pet. App. 49a. According to Roane, he was miles away in a Richmond hotel with Sandra Reavis when Moody was killed. *Ibid.* Roane further advised his attorney that Linwood Chiles and Carmela Cooley had driven him and Reavis to the hotel, and that Chiles had registered and paid cash for the room. *Ibid.*

To confirm Roane's alibi, Roane's trial counsel contacted Cooley. She confirmed that she had accompanied Roane, Reavis, and Chiles to the hotel, but could not specify the date. Pet. App. 50a. Roane's lawyer briefly sought to obtain hotel records which could have confirmed Roane's alibi. However, when that effort "did not readily yield" results, trial counsel "simply terminated the investigation" and "discarded [Roane's] alibi defense." *Id.* at 56a. Years later, after Roane was sentenced to death, an investigator (spending just three hours at the hotel) would locate hotel records corroborating Roane's alibi. *Id.* at 50a-51a.

2. **Trial and appeal.** At trial, there was divided eyewitness testimony as to who killed Moody. Two alleged "workers" in the distribution network, Denise Berkley and Priscilla "Pepsi" Greene, testified against petitioner. Berkley testified that, near midnight on January 13, 1992, she

was smoking crack cocaine at a building on the corner of Clay and Harrison streets when she heard a gunshot, followed by the breaking of a window. Pet. App. 47a. Berkley testified that, after disposing of her drugs, she ran outside and saw Roane repeatedly stab Moody. *Ibid.* Greene testified that she was standing on the corner of Clay and Harrison when she heard gunshots. *Id.* at 48a. According to Greene, after Roane and Tipton left the building, Roane directed her to retrieve a knife that he had stored at another alleged conspirator's residence. *Ibid.* Greene testified that Roane returned the knife to her later that night and instructed her to dispose of it. *Id.* at 48a-49a.

Berkley readily admitted that she was smoking crack cocaine at the time the events transpired, C.A. App. 4424, and that she received compensation from the government in connection with her cooperation, *id.* at 4487-4488. Greene's testimony was substantially impeached. She had been shot in the head after Moody's murder. When initially questioned by the police, she stated that she remembered nothing about the killing. Only after repeated interviews by the police did Greene's memory "improve." *Id.* at 2585.

Gina Taylor testified in Roane's defense. Taylor was a student who lived next door to the house where Moody was killed. Pet App. 49a. She was not involved in drug dealing or any other illegal activity, and had attempted to revive Moody following the attack. Although Taylor admitted to "kind of" having dated Tipton at one point, the district court found that, with respect to Roane, she was "an apparently disinterested eyewitness." Pet. App. 49a, 55a. Taylor testified that she witnessed the murder and told the police that Roane was not the killer. *Id.* at 49a.

Consistent with Taylor's testimony and other evidence, the Richmond police confirmed that they had originally focused on another suspect who had previously threatened Moody. In particular, a Richmond police officer testified that the original suspect in the case was someone named

Keith, who matched Taylor's description of the killer, and who had threatened Moody. *Ibid.* Indeed, "[t]wo hours before Moody was murdered, Keith had come to Moody's mother's house looking for him." *Ibid.* One week before that, moreover, "Keith's friends, armed with machine guns, had kicked in the door of Moody's mother's residence while attempting to find Moody." *Ibid.*

Following the presentation of evidence, the trial court declined to give the jurors a unanimity instruction with respect to the identity of the predicate crimes underlying the CCE charges. To establish a CCE violation, the government must prove (among other things) that the defendant committed a drug-related felony, as part of a "continuing series of violations," in concert with five or more persons under his supervision. Likewise, the jurors were never told that they had to agree unanimously on the identity of the three, sufficiently related predicate crimes that make up the requisite "continuing series." The jurors never heard about Roane's alibi for the Moody killing; nor did they see the corroborating hotel records. The jury found Roane guilty on all charges, including three counts of killing in connection with a continuing criminal enterprise in violation of 21 U.S.C. § 848(e). After considering aggravating and mitigating circumstances during the penalty phase, the jury recommended that Roane be sentenced to death *only* for the killing of Douglas Moody. C.A. App. 281-286. For the other killings, the jury recommended a sentence of life imprisonment. The trial court accepted the jury's recommendations. *Id.* at 293.

On direct appeal, the Fourth Circuit affirmed in part and reversed in part. The court of appeals reversed Roane's conviction under 21 U.S.C. § 846 on double jeopardy grounds. *Tipton*, 90 F.3d at 868. The court of appeals, however, rejected Roane's contention that the trial court had erred in failing to instruct the jury that, to convict Roane of engaging in a CCE, it must unanimously agree on at least

three related predicate acts constituting the "continuing series of violations" under 21 U.S.C. § 848(c)(2). Whether or not such an instruction was required, the court of appeals held that Roane was not prejudiced because the jury had unanimously found him guilty of more than three predicate violations, charged as separate offenses. *Tipton*, 90 F.3d at 885. This Court denied Roane's petition for a writ of certiorari on June 2, 1997. 520 U.S. 1253.

3. **The Section 2255 motion.** Roane then filed a motion for relief under 28 U.S.C. § 2255. Shortly before Roane filed that motion, this Court decided *Richardson* v. *United States*, 526 U.S. 813 (1999), holding that the jury in a CCE prosecution must unanimously agree that the defendant committed a "continuing series of violations," *and* on the identity of the related violations that make up that "continuing series." 526 U.S. at 824. Relying on *Richardson*, Roane reasserted his claim that the trial court had erred in failing to give a special unanimity instruction. Roane further argued that *Richardson* error is structural, obviating any need to show prejudice. In the alternative, Roane asserted that he had shown prejudice. The district court rejected those arguments. Pet. App. 83a.

In addition, Roane urged that his trial counsel, David Baugh, had rendered ineffective assistance by, *inter alia*, failing adequately to investigate Roane's alibi for the murder of Douglas Moody. After an evidentiary hearing, the district court agreed with Roane. Pet. App. 44a-63a. The court observed that, before trial, Roane had advised his lawyer of his alibi—that he was at a hotel several miles from the murder scene at the time of the murder—and that his lawyer "was convinced that Roane did not participate in the Moody murder." Pet. App. 49a. Roane told his lawyer that, on the night Moody was killed, Roane had gone to a hotel with Sandra Reavis, Linwood Chiles and Carmela Cooley; that Chiles had registered for the room; and that Chiles had paid cash. *Ibid.*

The district court found that there was "substantial information that indicated that Roane's claim that he was at a hotel at the time of the Moody murder was credible." Pet. App. 55a. The district court explained:

> First, counsel had the testimony of an apparently disinterested eyewitness, Gina Taylor, who insisted that Roane did not commit the murder. Second, counsel had the detailed account of the alibi from his client. Roane's candor with counsel regarding his other criminal acts assured counsel that the alibi was true. Third, counsel's initial investigation corroborated the details of the account provided by Roane. Although Carmella Cooley could not provide a specific date, she confirmed to counsel that she had accompanied Roane and Reavis to a hotel. With all this information in hand, *counsel had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story.* Under such circumstances, counsel was obliged to thoroughly review the hotel's records to determine whether they could yield support for an alibi defense.

Ibid. (emphasis added).

Roane's trial counsel, however, "did not follow through and seek the records with the vigor demanded by the situation." Pet. App. 56a. Although Roane's counsel did go to the hotel to request records that might have corroborated Roane's alibi, he limited his efforts to records from the night of Moody's murder (January 12, 1992) containing the name "Linwood Chiles." The resulting review was "very limited in scope and duration." *Ibid.* When that "did not readily yield [the corroborating evidence], counsel simply terminated his investigation, discarded the alibi defense and concentrated on the misidentification defense." *Ibid.* In contrast, when an investigator hired by Roane's post-conviction counsel conducted a search of the hotel records six years later, he discovered hotel records corroborating

Roane's alibi after just three hours of review. He found a hotel registration card for the night of January 12, 1992, under the name "Chiles, Larry," as well as a receipt for that night indicating that Chiles had paid cash for the room—confirming that Chiles had rented a room at the hotel on the night of Moody's murder, precisely as Roane had reported. *Ibid.*

The district court concluded that trial counsel's failure to find those documents was "attributable to the unreasonably limited amount of time and resources counsel devoted" to the investigation. Pet. App. 57a. The court reasoned that, given the potentially critical nature of the records and the strong reasons for believing in their existence, "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* at 56a. Here, counsel did neither, conducting only a "very limited" review of hotel records. *Ibid.* Nor was there justification for conducting such a limited review: "Neither [trial counsel] nor the record," the district court found, "suggest that constraints of time or resources played a part in [counsel's] decision to terminate his search for records corroborative of Roane's alibi." *Ibid.*

The district court, moreover, found that Roane was prejudiced by his counsel's inadequate investigation. Among other things, trial counsel had advised Roane not to testify absent objective confirmation of his alibi defense. Pet. App. 57a. If counsel had located the records, however, "Roane would have testified" in his own defense, asserting "that he was at the hotel at the time of the murder of Douglas Moody." *Ibid.* That testimony, in turn, "would have been somewhat corroborated by the introduction of the hotel records." *Id.* at 57a-58a. Particularly when weighed against the proof at trial, that additional evidence was suf-

ficient to create a reasonable probability of a different outcome. *Id.* at 58a. The eyewitness testimony at trial was divided, and there were significant difficulties with the government's witnesses, Denise Berkley and Pepsi Greene. *Ibid.*; see pp. 4-6, *supra*. Under the circumstances, "the foregoing alibi evidence would have bolstered Roane's plausible misidentification defense and is of sufficient credence to create a reasonable probability that Roane would have been acquitted of the charges related to the murder of Douglas Moody." Pet. App. 58a.[1]

In a separate opinion, the district court rejected all of Roane's other claims under Section 2255. Pet. App. 64a-189a. In the same opinion, the district court also rejected all of the Section 2255 claims of Roane's co-defendants, Tipton and Johnson, who had been sentenced to death for their roles in several killings in connection with the CCE. *Ibid.*

4. **The court of appeals' decision.** The Fourth Circuit affirmed in part and reversed in part. With respect to Roane's claim under *Richardson*, the court of appeals held that the trial court's failure to instruct the jury on the need for unanimity on the identity of the three related predicate offenses supporting the "continuing series" element of 21 U.S.C. § 848(c) had caused Roane no prejudice. The court of appeals reasoned that it had rejected the same claims on direct review (before *Richardson* was decided) "assuming that unanimity was required," as this Court later "confirmed" in *Richardson*. According to that prior decision, Roane could not have suffered "actual prejudice from the lack of a special unanimity instruction because, '[b]y its

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[1] In the same opinion, the district court rejected Roane's claim of actual innocence. Pet. App. 59a-62a. While the evidence was sufficient to create a reasonable probability of a different outcome before a jury, it was not so overwhelming that "no reasonable juror would have convicted Roane of the offenses related to the murder of Douglas Moody." *Id.* at 63a.

verdict, it is clear that the jury unanimously found [Roane] guilty of at least five predicate violations * * * .'" Pet. App. 19a (quoting *Tipton*, 90 F.3d at 885). The court of appeals adhered to that conclusion in this case. The court likewise rejected Roane's contention that the failure to provide the unanimity instruction required by *Richardson* is structural error. Citing its earlier decisions in *United States* v. *Stitt*, 250 F.3d 878, 883 (4th Cir. 2001), and *United States* v. *Brown*, 202 F.3d 691, 699 (4th Cir. 2000), the court held that "a trial court's failure to give a *Richardson* instruction is a procedural defect rather than a structural one." Pet. App. 20a. The Fourth Circuit also affirmed the district court's decision to reject each and every one of Tipton's and Johnson's challenges to their convictions and sentences. Pet. App. 17a-18a, 21a-39a.

With respect to the district court's ruling that Roane's trial counsel had rendered ineffective assistance in connection with the Moody killing, the Fourth Circuit reversed, reinstating the convictions and associated sentence of death. Pet. App. 39a-43a. The court of appeals did not dispute that trial counsel had "reason to believe that the hotel records could generate an alibi for Roane," and that he "was therefore obliged to make a reasonable investigation of them." *Id.* at 40a. But the court of appeals concluded that trial counsel's investigation, even if limited, was constitutionally adequate. The court explained that trial counsel had interviewed the potential alibi witnesses, called the hotel to ask for records, and had gone to the hotel to review records before giving up on the alibi and focusing solely on misidentification instead. *Id.* at 42a. The court of appeals did not address the amount of time or effort counsel actually spent reviewing the hotel records. But it concluded that counsel's defense, on the whole, was constitutionally adequate. *Id.* at 42a-43a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision in this case holds that a district court's failure to give the unanimity instruction required by *Richardson*—that the jury must unanimously agree on the specific violations that make up the "continuing series of violations" for a CCE conviction—is harmless whenever the jury finds the defendant guilty of three or more predicate violations. That approach conflicts with decisions of the First and Sixth Circuits. Rejecting the contention that *Richardson* error is automatically harmless simply because the jury finds the defendant guilty of more than three predicate offenses, those courts also require proof that a properly instructed jury would have found at least three of the crimes to be sufficiently related to each other so as to form a "continuing" series of violations. The Fourth Circuit's contrary approach turns *Richardson* on its head. It excludes from the prejudice analysis precisely the requirement that *Richardson* established—that the jury agree not only that the defendant committed three or more predicate acts, but that it unanimously agree on *which* predicate acts are *sufficiently related* to each other to form the "continuing series" supporting the CCE conviction. It also overlooks the structural role of the unanimity requirement in the American legal system.

The Fourth Circuit's decision, moreover, improperly sets aside the trial court's finding of ineffective assistance. Time and again this Court has made clear that counsel has a duty to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U.S. 668, 690-691 (1984). In this case, the district court found that counsel had no strategic reason to terminate, after a cursory attempt, the effort to locate the hotel records that surely had to exist and that would have confirmed Roane's alibi for the Moody homicide. The failure to put in the few hours that would have uncovered those records, moreover, was particularly

unreasonable given the critical nature of the Moody homicide charges—they were the only charges for which Roane was accused of personally committing a murder in this capital case. The Fourth Circuit's decision to hold trial counsel's investigation reasonable nonetheless, without identifying any reasonable basis for counsel's decision to terminate his review of critical documents, contravenes this Court's precedents.

A. The Courts of Appeals Are Divided On The Test For Prejudice Arising From *Richardson* Error

Enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, Section 848 of Title 21 of the U.S. Code makes it unlawful for any person to "engag[e] in a continuing criminal enterprise" or "CCE." 21 U.S.C. § 848(a). To establish a violation of the CCE statute, the government must show that the defendant (a) violated a federal felony drug law, and (b) that the violation was part of a "continuing series of violations," undertaken with five or more persons supervised by the defendant, and from which the defendant obtained substantial income or resources. 21 U.S.C. § 848(c); *Garrett* v. *United States*, 471 U.S. 773, 786 (1985). In *Richardson*, this Court held that, to convict a defendant of a CCE violation, the jury must find that "the defendant committed some 'continuing series of violations'" and agree *unanimously* on *which* predicate drug crimes are sufficiently related to make up the "continuing series." 526 U.S. at 815; see, *e.g.*, Sand, Siffert, Loughlin and Reiss, *Modern Federal Jury Instructions* § 6.21.848A, at 8-331 (Mathew Bender 2004) ("You must unanimously agree on which three violations constitute the series of violations") (8th Cir. Criminal Pattern Jury Instructions).

1. This petition concerns the proper test for prejudice where, as here, the jury is not instructed that it must unanimously agree on the identity of the violations that

make up the continuing series. In this case, the Fourth Circuit held that the *Richardson* error could not have caused prejudice because Roane was separately convicted of at least five felonies that qualify as predicate acts—more than the minimum three presumably required under 21 U.S.C. § 848(c)(2). Roane, the court stated, "'could have suffered no actual prejudice from the lack of a special unanimity instruction on the predicate violation element' because '[b]y its verdict, it is clear that the jury unanimously found [him] guilty of at least five predicate violations * * * .'" Pet. App. 19a (quoting *Tipton*, 90 F.3d at 885).

The Second, Fifth, and Tenth Circuits have adopted that same approach, holding that the failure to provide the unanimity instruction required by *Richardson* is automatically harmless whenever the defendant is convicted of three or more crimes that qualify as CCE predicates. See, *e.g.*, *Santana-Madera* v. *United States*, 260 F.3d 133, 140-141 (2d Cir. 2001) (because "the jury unanimously agreed on at least nine major violations," "it is beyond cavil that the jurors would have unanimously agreed on three predicate violations"); *United States* v. *Green*, 293 F.3d 886, 890 (5th Cir. 2002) (error harmless because jury convicted defendant of "the predicate violations"; "implicit in the convictions is the unanimous agreement that [the defendant] was guilty of three specific violations in the CCE series."); *United States* v. *Ross*, 347 F.3d 850, 852 (10th Cir. 2003) ("since the jury unanimously convicted Appellant of four predicate violations, *Richardson*'s requirement—that a jury unanimously agree * * * that the defendant committed each of the individual violations necessary to make up [the] continuing series—is met") (internal quotation marks omitted).

In contrast, the First and Sixth Circuits have held that the prejudice inquiry for *Richardson* violations requires a further inquiry. See *United States* v. *Escobar-De Jesus*, 187 F.3d 148, 162 (1st Cir. 1999); *Murr* v. *United States*, 200

F.3d 895, 906 (6th Cir. 2000). As the First Circuit explained, the fact that the jury unanimously convicted the defendant of more than three predicate acts "is not the end of the matter." *Escobar-De Jesus*, 187 F.3d at 162. Section 848 and *Richardson* "also require[] that the jurors agree that the 'series' of violations be 'continuing' in nature—that is, that they be related to each other in some way." 187 F.3d at 162. Consequently, *Richardson* error can be harmless only if the court concludes "beyond a reasonable doubt that the jury, had it been properly instructed, would have found that at least three of" the counts of conviction "were related to each other." *Ibid.* Accord *Murr*, 200 F.3d at 906 (error harmless if the jury "necessarily made factual findings establishing that the violations were related to one another").

2. The rule of automatic harmlessness applied by the Fourth Circuit in this case, and followed by the Second, Fifth, and Tenth Circuits, cannot be reconciled with *Richardson*. *Richardson*'s fundamental holding is that, to convict a defendant of a CCE violation, jurors must unanimously agree on *the identity* of the predicate offenses constituting the "continuing series." Where the *Richardson* instruction is omitted, the fact that the jury returned guilty verdicts on several underlying crimes along with the CCE conviction does make it clear that each juror concluded that the defendant committed the offenses of conviction and that *some* of those offenses were sufficiently related to support the CCE conviction. But it does not demonstrate that the jurors, if properly instructed, would have agreed on *which* offenses were sufficiently related to make up the "continuing series."

For that reason, this Court has recognized that its holding in *Richardson* "will make a difference where, as here, the Government introduces evidence that the defendant has committed *more underlying drug crimes than legally necessary* to make up a series." 526 U.S. at 818

(emphasis added). The Fourth Circuit's approach sets that observation on its head, holding that *Richardson* makes *no* difference in precisely the same cases—those with more than three predicate convictions.

Congress, moreover, did not "intend[] to substitute the CCE offense for the underlying predicate offenses." *Garrett*, 471 U.S. at 785. Rather, in defining a "continuing criminal enterprise" by reference to a "series of violations," Congress sought to "add a new enforcement tool to the substantive drug offenses" to reach the "top brass" in drug rings. *Id.* at 781, 784. The Fourth Circuit's approach effectively reads the "continuing series" element out of the prejudice inquiry and out of the CCE statute.

3. Finally, the Fourth Circuit overlooked the structural significance of the unanimity instruction in our system of criminal justice. *Richardson* touches on one of the cornerstones of American criminal jurisprudence: the government's obligation to persuade a *unanimous* jury as to each and every element of a crime charged. The requirement of unanimity is part of the framework of our system of criminal justice, *United States* v. *Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978), and "one of the indispensable features of federal jury trial[s]," *United States* v. *Scalzitti*, 578 F.2d 507, 511 (3d Cir. 1978). The right to a unanimous verdict is so critical that it is one of the few rights that cannot be waived in any circumstances. *United States* v. *Ullah*, 976 F.3d 509, 513 (9th Cir. 1992); *United States* v. *Gipson*, 553 F.2d 453, 456 n.4 (5th Cir. 1977). For that reason, *Richardson* error is structural—a "defect affecting the framework within which the trial proceeds"—and requires reversal without inquiry into prejudice. *Neder* v. *United States*, 527 U.S. 1, 8 (1999). The absence of a unanimity instruction "'infect[s] the entire trial process,' and 'necessarily render[s] [the] trial fundamentally unfair.'" *Ibid.* (citations omitted); see, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction).

The Fourth Circuit and other courts of appeals have nonetheless concluded that *Richardson* error is not structural. Pet. App. 20a; *Escobar-De Jesus*, 187 F.3d at 161-162; *Santana-Madera*, 260 F.3d at 139-141; *Lanier* v. *United States*, 220 F.3d 833, 838-839 (7th Cir. 2000); *United States* v. *Rivera*, 347 F.3d 850, 851-852 (10th Cir. 2003). Those courts, however, have proceeded on the assumption that a *Richardson* violation is the functional equivalent of omitting an element of the crime charged, which (under *Neder*) is subject to harmless error analysis. That assumption overlooks the significance of unanimity in ensuring that the results of federal criminal trials are both reliable and fundamentally fair. In any event, even if *Richardson* error is not structural, the critical role of unanimity in our system of criminal justice reinforces the need for any prejudice inquiry to be complete and exacting. The approach adopted by the Fourth Circuit here (unlike that of the First and Sixth Circuits) is not.[2]

B. This Court Should Clarify The Proper Standard Of Deference Owed To District Court Findings On Ineffective Assistance Claims

The Fourth Circuit's decision, moreover, strays from the standards this Court has established for ineffective assistance of counsel claims and improperly disregards the district court's specific factual findings. This Court has instructed that trial counsel has a duty to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U.S. 668, 690-691 (1984). In this case, the

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[2] Roane's co-defendants at trial and co-appellants in the court of appeals, Richard Tipton and Cory Johnson, are filing separate petitions for a writ of certiorari in which they urge that, under *Richardson*, the jury must also unanimously agree on the identity of the five people under the defendant's supervision or management, a claim Roane raised on direct review. Roane joins in those arguments and the remaining contentions raised by Tipton and Johnson.

district court concluded—and made specific findings to support its conclusion—that counsel's investigation of Roane's alibi defense was not reasonable. As the district court explained, counsel had "substantial information" indicating "that Roane's claim that he was at a hotel at the time of the Moody murder was credible." Pet. App. 55a. There was an "apparently disinterested" eyewitness who insisted that Roane was not the killer. *Ibid.* Roane provided a "detailed account of the alibi," explaining that Carmela Cooley and Linwood Chiles had accompanied him to the hotel, and that Chiles had registered for and paid cash for the room. *Ibid.* Counsel's interview of Carmela Cooley "corroborated the details of th[at] account." *Ibid.* Finally, Roane's "candor with counsel regarding his other criminal acts assured counsel that the alibi was true." *Ibid.* Indeed, counsel "was convinced" that Roane was not responsible for the Moody killing. *Id.* at 49a.

Given that information, counsel "had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story." Pet. App. 55a. Yet counsel's review of the hotel records was "very limited in scope and duration." *Ibid.* When his brief search for a registration card under the name Linwood Chiles (but not "Larry Chiles," "L. Chiles," or "Chiles") did "not readily yield [the corroborating evidence], counsel simply terminated his investigation, discarded the alibi defense and concentrated on the misidentification defense." *Ibid.* The district court specifically found that there was no justification for the limited scope of counsel's efforts: "Neither [trial counsel] nor the record suggest that constraints of time or resources played a part in [counsel's] decision to terminate his search for records corroborative of Roane's alibi." *Ibid.* Because of the "unreasonably limited amount of time and resources counsel devoted" to checking hotel records, *id.* at 57a, counsel missed potentially critical evidence tending to corroborate Roane's alibi, including a registration card for

the night of Moody's death under the name Larry Chiles, as well as a receipt indicating that Chiles had paid cash for the room, precisely as Roane had indicated. *Ibid.* Indeed, more than six years after the murder, Roane's post-conviction investigator found those records at the hotel within three hours. Trial counsel "could have located the same documents * * * if he had subpoenaed the records or if he had spent three hours looking through the hotel records." Pet. App. 51a.

The Fourth Circuit nonetheless held that counsel's performance was not deficient because, in its view, counsel made a "strategic choice" to abandon Roane's alibi defense. Pet. App. 41a. But placing the label "strategic choice" on an action does not make it reasonable, much less "strategic." For a decision to be reasonable, there must be some plausible basis for it. In this case, the district court found that there was none. "Neither [trial counsel] nor the record suggest that constraints of time or resources played a part in [counsel's] decision to terminate his search for records corroborative of Roane's alibi." *Ibid.* Nowhere did the Fourth Circuit disagree with that finding, much less offer a basis for deeming it clear error.

Neither the record nor common sense supports the Fourth Circuit's suggestion that trial counsel "turn[ed] to and focus[ed]" on the misidentification defense after concluding that the alibi defense was not viable. The district court—which conducted the trial of this case—expressly concluded (and trial counsel testified) that the misidentification defense and alibi were mutually reinforcing. C.A. App. 2178b. As the district court explained, Roane's contention that the government's witnesses were mistaken in identifying him, a theory already supported by another eyewitness to the crime, would have been significantly "bolstered" by evidence that he was miles away in a hotel at the time of the murder. Given the absence of any time, financial, or other constraints, there was simply no good

reason for counsel to give up on the effort to find records supporting Roane's alibi—an alibi that counsel himself believed. Trial counsel testified unequivocally that his abandonment of the alibi was not the result of a tactical decision, C.A. App. 2178b, and the Fourth Circuit offered no basis for declaring otherwise.

Ultimately, the Fourth Circuit's decision rests on the implicit assumption that any sort of "search" is sufficient, no matter how incomplete, if counsel makes *other* efforts to mount a defense. But the sufficiency of any investigation must be judged in light of the totality of the circumstances. *Strickland*, 466 U.S. at 691. Here, counsel believed Roane's alibi. He knew that it had witness support. He knew that corroborative records must exist. He concluded the alibi would reinforce his misidentification defense. And there were no limits on time or resources preventing him from conducting a sufficient investigation—from putting in the three hours of effort—necessary to locate potentially dispositive records corroborating Roane's alibi. He simply failed to make the required effort. Under the circumstances, the decision to terminate the search after minimal effort cannot be attributed to a legitimate strategic call.

The seriousness of counsel's error is particularly evident given the role of the Moody homicide in this case. The charge was not merely capital. It was the *only* capital count in which Roane was alleged to have killed by his own hand,[3] and the *only* capital charge for which Roane received the death penalty. If counsel had to raise reasonable doubt

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[3] Roane was accused of being the "lookout" in the murder of Peyton Maurice Johnson. C.A. App. 4860. The government claimed that Roane entered the "nip joint" where Peyton Johnson was; that Roane left; and that one of Roane's co-defendants then entered and shot Peyton Johnson. Louis Johnson was shot by multiple persons. Roane was accused of being armed and present at the scene of the crime; the evidence, however, showed that Roane did not shoot and kill Louis Johnson. *Id.* at 5136.

about a single accusation to save Roane's life, this one was it. In such a case, it is simply not enough for counsel to show up at the relevant location *intending* to conduct a reasonable search for corroborating documents. He must also follow through *by doing so*. Here, counsel did not.

Finally, we note that this question is similar to the fourth question presented in *Rompilla* v. *Beard*, No. 04-5462, cert. granted November 12, 2004 (argued Jan. 18, 2005). *Rompilla* concerns whether the defendant received effective representation at a capital sentencing "where counsel's background investigation" was "limited to conversations with a few family members," given that "other sources of background information * * * were available but ignored by counsel" and that the additional sources of information "would have provided compelling mitigating evidence." No. 04-5462 Pet. Br. ii. In that case, counsel failed to obtain documents about the defendant's mental deficiency and history of childhood abuse, even though they were accessible in school records and in the juvenile court records held in the clerk's office of the courthouse where the defendant was being tried. *Id.* at 10-14. There, as here, the district court held that counsel's failure to make a reasonable investigation was constitutionally ineffective. There, as here, the court of appeals reversed, holding that other efforts (such as hiring several experts) rendered the performance adequate. See *Rompilla* v. *Horn*, 355 F.3d 233, 253 (3rd Cir. 2004).

Indeed, the claim of ineffectiveness in this case is in many respects stronger than the one in *Rompilla*. In *Rompilla*, trial counsel's interviews of potential witnesses did not suggest that further research would uncover supporting records. According to the court of appeals in that case, trial counsel "had grounds for believing that if there was any mitigating evidence of this sort to be found, at least a hint of its availability would be disclosed in the interviews with [the defendant] and his family members." 355 F.3d at

252. Here, in contrast, trial counsel had more than a "hint" that the relevant records would exist. He had, as the district court found, every reason to believe that they did exist, including Roane's credible statements, and confirmation from another witness. Because this Court's resolution of *Rompilla* may bear strongly on the proper resolution of Roane's ineffective assistance claim, at a minimum the petition in this case should be held pending the decision in *Rompilla*, and then disposed of in light of the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, it should be held pending the Court's decision in *Rompilla* v. *Beard*, No. 04-5462, cert. granted November 12, 2004 (argued Jan. 18, 2005), and then disposed of in light of the decision in that case.

Respectfully submitted.

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February 22, 2005